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**FRANK DENIED
WRIT BUT**

**IS PERMITTED TO
APPEAL**

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**NEWMAN TO
CERTIFY
WRIT OF ERROR
TO**

U. S. SUPREME COURT

Although Losing in U.
S. Dis-

trict Court, Frank
Wins

Point by Getting
Case Be-

fore Highest Court

CASE NOW TAKES
PLACE

ON COURT'S CALENDAR

This Means That the
Execu-

tion of Frank Will Be
Stayed

Indefinitely or Until
Higher

Court Acts

Judge W. T. Newman, of the United States district court, on Saturday denied the application for a Writ of Habeas Corpus brought by Attorneys Henry Peeples and Harry Alexander in behalf of Leo M. Frank.

But in denying the application, Judge Newman granted the attorneys for Frank the right to appeal his action to the United States Supreme Court, which they will do.

Judge Newman announced his decision immediately after the conclusion of the arguments by the petitioning attorneys, and without calling on the State—as represented by Solicitor Hugh Dorsey and Attorney General Warren Grice—to present their side of the case.

When Mr. Alexander concluded, Judge Newman remarked:

“When this application was presented to me, I asked the Solicitor General and the Attorney General to be present at the hearing. However, it is unnecessary to hear from them. This matter has been tried in the State Courts. The State Supreme Court held that it did not present a Federal Question, or if one had been presented it should have been embodied in the motion for a new trial.”

“This decision was taken before the justices of the United States Supreme Court, and Justices Lamar and Holmes held that it is for the States to determine the method of practice, and that what was done in the State Courts was a matter of practice and involved no federal question. The status of the case seems to be the same here as when it went to the United States Supreme Court. In view of this, I have not the jurisdiction or the power to grant the writ. It, therefore, follows that the petition is denied.”

APPEAL ALLOWED.

Attorney Peebles was immediately on his feet and inquired if Judge Newman would certify an appeal to the United States Supreme Court. Judge Newman asked Solicitor Dorsey if he wished to enter any objection to allowing such an appeal. The solicitor said this was a new proposition and he did not know whether the State was prepared to do more than object. He said he would like to be allowed until Tuesday to examine into the State’s rights in the case. He said if Frank was not entitled to the right of appeal, he would like for it to be denied and the State wished to object in the event the court had discretion.

Mr. Dorsey then took his seat, and Judge Newman announced that he would allow the Appeal.

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Mr. Dorsey then took his seat, and Judge Newman announced that he would allow the appeal.

EXECUTION STAYED.

Judge Newman's action in allowing the appeal places the Frank case regularly on the calendar of the United States Supreme Court and automatically operates to stay the execution sentence until the United States Supreme Court has disposed of it.

It is probable that the case will be heard by the Supreme Court within the next thirty or sixty days, as it is the custom of the court to give criminal cases the right of way over other cases of less urgency.

OTHER CASES SIDETRACKED.

In being motion day in Judge Newman's court, the hearing was held in the public court room, and, in addition to Frank's lawyers, there were several other lawyers present in their own cases when court opened at 10 o'clock.

Judge Newman announced that he had agreed with Harry Alexander, one of Frank's lawyers, to give the Frank petition the right-of-way over all other motions on the calendar, and he then proceeded to sound these other motions and fix dates for hearing them, which consumed twenty minutes.

At 10:20 o'clock the hearing of the Frank petition commenced, with the reading of the petition by Attorney Henry C. Peeples, who, with Harry Alexander, prepared and filed it.

Attorneys Herbert and Leonard Haas, also of counsel for Frank, were in the court room, but as spectators rather than as attorneys directly engaged in this particular phase of the legal battle.

The State was represented at the hearing by Solicitor Hugh M. Dorsey, his Assistant, E. A. Stephens, and Attorney General Warren Grice.

AUTHORITIES CITED.

When Attorney Peeples finished reading the petition, Judge Newman asked him if he had any authorities to cite in support of the legal points set forth.

Attorney Peeples said he doubted the necessity of citing authorities in view of the fact that no objection had been raised to the issuance of the writ.

Judge Newman said he was ready to hear the authorities if Attorney Peeples had any, and Attorney Peeples thereupon began to read his citations.

After doing this, Attorney Peeples entered upon his argument in support of the petition.

He was interrupted in a few moments by Judge Newman, who inquired whether any federal question had been raised in the motion for a new trial for Frank.

Mr. Peeples replied that no such ques-

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NEWMAN TO CERTIFY WRIT OF ERROR TO U. S. SUPREME COURT

(Continued from page one.)

tion had been raised, but that the motion did include a reference to the fact that Frank was not present in court at the time the verdict was rendered. He added, however, that the motion to set aside the verdict raise a specific federal and Constitutional Question. He then read the head notes of the Georgia Supreme Court's decision denying Frank's motion to set aside the verdict.

Mr. Peeples inferred from this decision that the State Supreme Court treated Frank's absence from the Court Room merely as incidental and treated his presence in the Court Room as a right which he might wave. He declared that Frank's right to be present when the verdict was returned was an essential and fundamental right guaranteed to him by the Constitution of the United States, and that any infraction of this right violated the due process of law guaranteed to all citizens. He said the fact that Frank was in the custody of the State, and, therefore, kept away

by the State, was the same as if he had never been notified to be present.

A FUNDAMENTAL RIGHT.

Mr. Peeples argued that Frank himself could not expressly waive his presence, and that certainly he could not by implication acquiesce in a waiver by his counsel.

“This right,” reiterated Mr. Peeples, “is a fundamental right, your honor, and not an incidental right.”

Referring to the probable attitude of the United States district court toward the petition for a Writ of Habeas Corpus, Mr. Peeples said:

“We well know, your honor, that this court would hesitate and seriously consider before interfering with judgments rendered by State Courts. We also know that this and other United States District Courts have held that a Writ of Habeas Corpus of this kind cannot be used as a function for a Writ of Error. But these courts have held on numerous occasions that if at any time the State Courts lose jurisdiction of a case, the federal courts can on appeal examine and determine whether jurisdiction had been maintained, and, if not, can discharge the prisoner.”

Mr. Peeples then cited his authorities in support of this contention.

Continuing his argument, Mr. Peeples said:

“We realize, your honor, that at the very threshold here we are met by the question of difference between an application to the United States Supreme Court for a Writ of Error and the Application to this Court for a Writ of Habeas Corpus. There is a fundamental difference. There is a fundamental difference. The jurisdiction of the Supreme Court on a Writ of Error from a State Court is very narrow and restricted. But on a Writ of Habeas Corpus the United States District Court has the discretion and latitude to examine and determine whether a State Court has lost

jurisdiction. As I say, the difference is a wide one and a fundamental one.”

Mr. Peeples here read the statements of Justices Lamar and Holmes, of the United States Supreme Court when they denied Frank’s application for a Writ of Error. He emphasized the fact that this denial was based on the decision of the Georgia Supreme Court in holding that Frank had not followed the State’s procedure when he failed to include absence from the Court Room as a denial of a Constitutional Right in his first motion for a new trial. It was argued by Mr. Peeples that these justices in the necessary hurry and limited time at their disposal had misconceived the essential point in the State Supreme Court’s decision. He contended that the ruling relating to procedure was not of such fundamental importance as ruling, in effect, that Frank’s right to be present was incidental and could be waived. Mr. Peeples read and commented on the opinion expressed by Justice Holmes in denying the petition for a Writ of Error, in which he said he seriously doubted if Frank, because of the atmosphere and excitement surrounding his trial, had fair and impartial justice.

In the course of his argument Mr. Peeples said:

“We take a different view of this case from the view taken by the Supreme Court of Georgia in holding that absence from the Court Room was a mere incident of the trial and a right which the defendant could waive. We hold that it is a fundamental right which cannot be waived. The Supreme Court of Georgia never held before that a motion for a new trial was the proper remedy for the point which Frank makes in his motion to set aside.”

FORCED TO STAY AWAY.

Mr. Peeples explained that there are two different kinds of relief involved—a motion to set aside, and a motion for a new trial. In a motion for a new trial, a new trial. In a motion for a new trial, in the event of success, the defendant would simply have another trial. But in a motion to set aside a verdict as a nullity,

such as the motion made by Frank, the defendant, in the event of success, could set up a plea of second jeopardy and by that means obtain his freedom. Therefore, Mr. Peeples argued, it would be depriving Frank of a fundamental right to force him to make a point of absence from the Court Room in a motion for a new trial. He dwelt on the importance of the right of a prisoner to be present when a verdict is returned, and referred to an instance cited by Justice Bleckley, of the Georgia Supreme Court, of a Case in Fayette County where a jury brought in a unanimous verdict of guilty, but when the Jury was being polled one juror suddenly declared that it was not his verdict. The jury was sent back and finally returned a verdict of not guilty. Mr. Peeples emphasized the fact that Frank was held away from court at the time the verdict was returned by the order of the Court. He said that in a measure, Frank was forced to stay away.

At the conclusion of the argument of Mr. Peeples, Attorney Harry Alexander began his argument.

Mr. Alexander discussed at some length the history and functions of the Habeas Corpus. IN this connection, he said:

NEW QUESTION.

“This matter involves one of the gravest questions that come before a Federal Court. To a large extent it is a new question. It is a question which prior to this case was already being considered by the lower Federal Court, and there had been some discussion on it by judges of the Circuit Court of Appeals. The question is one which was bound to develop and come before these courts.”

Mr. Alexander here cited one or two famous Habeas Corpus Cases in point, and at the conclusion of the reading of one of these cases Judge Newman interrupted to remark:

“The question in this case is proper practice. It appears from the decision of the State Supreme Court that Frank could have and should have raised the Federal question in his motion for a new trial.”

Judge Newman then read portions of Justice Lamar's and Justice Holmes' opinions in declining to certify Frank's Application for a Writ of Error. He called attention to the fact that both of these justices, and later the entire bench of the United States Supreme Court, held that it was for the States to determine the question of process and procedure.

MATTER OF STATE PRACTICE.

"This ruling," commented Judge Newman, "involved a matter of State practice and presents no Federal question. It seems to me that question was determined by Justices Lamar and Holmes and by the entire bench of the United States Supreme Court. In the face of that, how can I issue a Habeas Corpus Writ? That's the point on which I would like to hear from you."

Here Judge Newman recessed court for five minutes.

When court reconvened, Mr. Alexander resumed his argument, and in replying to Judge Newman's question he contended that where a party has attempted to carry his case to the State Courts, and where he has been prevented through no fault of his own from securing consideration, he has the right to obtain such consideration through a writ of Habeas Corpus.

"The fact that the United States Supreme Court says there is no Federal Question before us," said Mr. Alexander, "gives this petitioner the right to have an adjudication of his Federal right, and if he has failed through no fault of his own he has the right to come into the Federal Court and obtain a determination of his Federal Rights."

NEW PRECEDENT OF COURT.

"This man was cut off through error in his procedure. He is raising a Federal Question in his appeal, but has never been able to get that question heard, and I say, your honor, that he has the right in some way, in some court, to have his appeal heard."

"His Attorneys in the motion for a new trial were experienced lawyers well conversant with the procedure and practice in the

State Courts. When they failed to include this Federal Question in the motion for a new trial they followed the practice and procedure which had been laid down by the courts for fifty years and which had obtained without interruption. It is a recognized fact that the State Supreme Court can overturn all precedents and set up a new practice and procedure. This it did in the decision denying Frank's motion to set aside."

Mr. Alexander said the defendant had carefully and diligently followed the practice laid down by the highest courts of the State and that when he omitted in his motion for a new trial to raise this federal point he simply acted in conformity to previous decision both of the State Court of Appeals and the State Supreme Court, which had held that the proper method was not to raise this point in the motion for a new trial but to raise it in a motion to set aside the verdict.

Mr. Alexander further contended that in view of the State Supreme Court's reversal of this long established procedure, the United States Supreme Court, not, would not, and did not consider the merit of the Constitutional Point, but only considered the question whether the State Supreme Court had the right to determine the question of procedure, and throw Frank out by holding that the State Court does have this right.
